Supreme Court, U.S.
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No. 01-963

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,

Petitioner,

v.

FREEMAN AYERS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the lower court properly instructed the jury that it could award damages for fear of cancer in a FELA case if it found that the plaintiffs had sustained asbestos related injuries and that the plaintiffs' fear of developing cancer as a result of their asbestos exposure was reasonable?

Whether joint and several liability applies in FELA cases when the trial court determines that the alleged negligence of multiple tortfeasors resulted in a single, indivisible injury such as occupational pneumoconiosis?

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STATEMENT OF THE CASE

A. Introduction

This litigation involves six retired railway workers who brought FELA (Federal Employers Liability Act) lawsuits for occupational pneumoconiosis against the Norfolk and Western Railway Company. These cases do not present a good vehicle for deciding the fear of cancer and apportionment of damages issues raised by the petitioner. Because of the general verdict forms used with the railroad's acquiescence, there is no way of determining how much, if any, of the damages were awarded for fear of cancer.

Only two of the five plaintiffs had non-railroad exposure to asbestos. Even in those cases, the railroad exposure was far from marginal. One of the plaintiffs with non-railroad exposure, Carl Butler, settled with a non-railroad employer, APCO (Appalachian Power Company), and the verdict against the petitioner was reduced by the amount of that settlement, as well as the amount of Mr. Butler's workers' compensation award. To have employed *both* a settlement offset and some other means of apportioning damages would have resulted in "double dipping." The injuries suffered, mixed dust pneumoconioses, were properly found by the trial judge to be indivisible, and incapable of rational apportionment on the basis of causation. Even if the lower court had abandoned the doctrine of joint and several liability for multiple tortfeasors whose negligence combine to cause an indivisible injury, there was no evidence presented to establish any fault on the part of the non-railroad employers for purposes of apportioning damages. Thus, these cases present a poor vehicle for deciding apportionment issues.

The conflicts of authority alleged by the railroad are more apparent than real. The cases cited in support of a "physical manifestation" requirement in emotional distress cases are factually distinguishable and almost all of them predate this Court's opinions in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994) [Gottshall] and *Metro-North Commuter Railroad v. Buckley*, 525 U.S. 424 (1997) [Metro-North]. The cases cited for apportionment of damages do not involve multiple tortfeasors whose negligence was found by the trial court to cause an indivisible injury, which is the type of injury alleged here.

The holdings of the lower court were correct and consistent with similar rulings in many other jurisdictions. Furthermore, the petition exaggerates the impact of the trial court's rulings, and the importance of West Virginia as a forum for FELA cases, while unfairly accusing the Supreme Court of Appeals of West Virginia of engaging in "a pattern of injustice and maladministration" merely because it has declined to accept two petitions for appeal filed by the defendant.

B. Occupational Exposure

At trial, all of the plaintiffs testified about their exposure to asbestos and other toxic airborne contaminants, as well as their employer's failure to provide them with breathing protection or warn them about the hazards of exposure to airborne dust. Although the railroad asserts at page 8 of the petition that "Respondent John Shirley worked for N&W primarily as an office clerk with minimal or no exposure to asbestos," Mr. Shirley testified about significant exposure to asbestos, as well as exposure to traction sand and coal dust. He worked in buildings with asbestos-covered steam

pipes. Trial Transcript (4/17/98) at 18. The Inspector's Office had asbestos walls and ceilings and there were asbestos covered pipes in the washrooms. *Id.* at 19. As a laborer in the station house, he shifted merchandise among cars, handling sheets and rolls of asbestos. *Id.* He also moved large (50-100 lb.), dusty bags of asbestos, *id.* at 12, and swept up when bags and cans of asbestos broke open. *Id.* at 13-6. The railroad also minimizes Mr. Butler's exposure to asbestos, but he also testified about significant exposure to asbestos and coal dust. *See* Trial Transcript (4/16/98) at 9-14 (discussing his work around asbestos insulated steam locomotives that were being repaired, insulated steam pipes and coal dust from stoves and coal cars).

Two of the plaintiffs, Mr. Ayers and Mr. Butler, had some asbestos exposure at non-railroad jobs. The defendant argues that the damages awarded to these gentlemen should have been reduced to reflect these non-railroad exposures. This argument lacks merit for four reasons: First, all of the plaintiffs' asbestos exposures contributed to the development of their asbestos related disease and under FELA, the railroad is responsible if its negligence played even the slightest part in causing those injuries. Second, Mr. Butler's award was reduced by his workers' compensation and employer settlements. Third, the railroad did not seek to add any third party defendants to these lawsuits (such as the Ford dealership where Mr. Ayers worked for a time), or make any effort to obtain contribution from any third parties. Finally, there was no evidence presented by the railroad to show that the non-railroad employers were negligent.

C. Medical And Scientific Evidence

At trial, none of the treating doctors testified, although both sides relied on medical records from treating physicians and called various expert witnesses to the stand. Dominic Gaziano, M.D., a Board Certified Pulmonologist and NIOSH Certified B-Reader, Trial Transcript (4/16/98) at 27, 38-9, was called as an expert witness by the plaintiffs. He testified that each of the plaintiffs suffered from an occupational lung disease (either asbestosis or a mixed dust pneumoconiosis including asbestosis and silicosis) that had been caused, at least in part, by occupational exposure to asbestos and other toxic dusts on the railroad. *Id.* at 76, 100, 115, 125, 128, 135. In each case, the plaintiff's condition was permanent, likely to worsen in the future, *id.* at 79, 102-03, 116, 125, 129, 140, and had already resulted in a measurable impairment of pulmonary function. *Id.* at 78, 101-02, 117, 124, 128, 135. Furthermore, because of their occupational exposure to toxic dusts, and their present occupational lung diseases, the plaintiffs were at risk of developing lung cancer and mesothelioma, *id.* at 80-1, 86 111-12, 120, 125, 129, a painful, almost invariably fatal cancer of the pleural lining. *Id.* at 50-1. Because of this increased risk of developing malignancies, the plaintiffs needed to have yearly chest x-rays and regular (every two or three years) pulmonary function tests. *Id.* at 84-5, 112, 129. Dr. Gaziano's diagnoses of occupational lung disease were corroborated by medical records from treating physicians in the Butler, Ayers and Spangler cases. Trial Transcript (4/16/98) at 66, 90-91, 98-100. Even Dr. Renn, a medical expert retained by the defendant, agreed that all of the plaintiffs were at risk of developing mesothelioma because of their occupational exposure to asbestos. Trial Transcript (4/24/98) at 203, 208, 213, 216, 218, 221.

Arnold Brody, a prominent scientist who studies lung pathology, testified about his research concerning the effects of asbestos fibers on the lung. He opined, among other things, that smokers exposed to asbestos have a synergistic risk of developing lung cancer, which means that the risk of developing cancer is multiplicative, rather than simply additive. Trial Transcript (4/15/98) at 150. He also testified about two epidemiology studies which showed that asbestosis patients who smoked had a 10% mortality rate from mesothelioma, and a 39% mortality rate from lung cancer. *Id.* at 134, 135. Smokers who were not exposed to asbestos had a much lower risk of dying from cancer. *Id.* at 134-35.

Dr. Renn, the defendant's medical expert, also testified about cancer risks during his cross examination. He admitted that the studies by Berry and Courts showed a 9-10% mortality rate from mesothelioma among asbestotics, Trial Transcript (4/24/98) at 159, and that smoking does not increase the risk of developing mesothelioma. *Id.* at 159-60. He also discussed the synergistic relationship of smoking and asbestosis as it relates to the development of bronchogenic lung cancer, opining that asbestotics who did not smoke had a 2.5% risk of developing lung cancer, *id.* at 162, that smokers without asbestos exposure had a 10-15% risk of lung cancer, *id.* at 163, and asbestotics who smoked had a 39% risk of dying from lung cancer. *Id.* at 161. In other words, asbestotic populations had a much higher cancer risk than populations without asbestosis. *Id.*

Only two of the plaintiffs were current smokers. John Shirley, Jr. had never smoked, while Carl Butler quit in 1965, Trial Transcript (4/6/98) at 6; Doyle Johnson quit in 1987, Trial Transcript (4/17/98) at 7; and Clifford Vance quit

in 1985. Trial Transcript (4/15/98) at 67. Dr. Renn, the defendant's medical expert, admitted that Mr. Butler, despite his smoking history, had no lung impairment due to smoking. Trial Transcript (4/24/98) at 203. Dr. Gaziano, plaintiff's medical expert, testified that Mr. Vance had no measurable impairment from smoking. Trial Transcript (4/16/98) at 27. Dr. Renn also found no measurable impairment of lung function for Mr. Vance. Trial Transcript (4/22/98) at 169. All of the plaintiffs with a measurable lung impairment related to smoking received a significant reduction of their award for comparative negligence. *See* Johnson Judgment (14%), Ayers Judgment (31%) and Spangler Judgment (37%). Thus, petitioner's assertion at page 24 that "N&W is now solely responsible for massive damage awards to former employers . . . whose lung disorders are largely attributable to their own smoking habits" is completely unfounded.

D. Lay Testimony Concerning Physical And Emotional Injuries

Clifford Vance testified that he gets short of breath when he walks up a hill, walks "too fast", or when he tries to lift anything and stated he feels like he's "gonna fall dead." Trial Transcript (4/15/98) at 31. He can't do the same things he used to do with the grandchildren ten years ago. *Id.* at 33-4. He used to have a two acre yard that he took care of by himself, but he sold it and moved because he couldn't keep it up anymore. *Id.* at 33. Now, he has a very small yard, *id.* at 31, about 70'x80' that takes him 20 minutes to mow, and he has to rest if he tries to mow it all at one time. *Id.* at 32. His condition has changed a lot in the last five to eight years. *Id.*

Carl Butler testified that his breathing has gotten worse since 1991. Trial Transcript (4/16/98) at 16. Now, he can't work more than 10 or 15 minutes without having to sit down and rest. *Id.* at 17. Because of his physical condition, he has had to buy equipment to make his farm work easier. *Id.* For example, he bought a round bailer so he wouldn't have to put square bales on a truck. *Id.* at 17-8. He used to hunt, but now he can't get around the hills. *Id.* at 18. Moreover, he can't garden as well as he used to. *Id.* at 19. For the last two or three years, he has only been able to hoe half a row without resting. *Id.* at 19. He also has concerns about contracting cancer, especially since he watched his mother suffer with breast cancer, and he had a son who died from colon cancer. *Id.* at 20. It "scares" him to think he might have to go through that pain and suffering. *Id.* He is also concerned about who will take care of his farm if he falls sick. *Id.* If he carries a block of salt 50 yards, he has to stop three times. *Id.* at 16.

Freeman Ayers testified that he noticed some shortness of breath before 1991, and that it has been getting worse. Trial Transcript (4/17/98) at 25. Now, he can't mow the grass, climb a hill or walk more than a block and a half, without becoming short of breath. *Id.* In fact, he had to stop and rest walking from the hotel to the parking lot to get a ride to the courthouse. *Id.* at 26. Mr. Ayers used to fish, but he sold his 28' boat and most of his equipment because he no longer had the wind or strength to go fishing. *Id.* at 26-27. He knows he might develop cancer because of his occupational exposure to dust, and has tried to prepare for that possibility by paying off his Ranger. *Id.* at 27. Mrs. Ayers did not attend the trial because he did not want her to know about it. *Id.*

John Shirley, Jr. testified that he suffers from shortness of breath, Trial Transcript (4/17/ 98) at 32, and it is getting

worse. *Id.* at 37. He can't walk or talk very much, and he has a cane so he can stop and rest when he is walking. *Id.* at 32. He can't climb more than a few steps at a time, do housework or sing in the choir. *Id.* He used to travel and sing with a gospel group for 13 years, but the group broke up in the mid '80's when he couldn't sing anymore. *Id.* at 34. Although he is worried about cancer, *id.* at 38, he is even more concerned about his shortness of breath. *Id.* at 39. He is a "nervous wreck," *id.* at 37, and sometimes depressed. *Id.* at 38. He thinks about his family, and is trying to make preparations and have everything in order. *Id.* at 37.

Doyle Johnson testified that he suffers from shortness of breath; that he used to mow his lawn without stopping in 20 minutes, but now he has to stop and rest and it takes him an hour; that when he retired in 1987 he could walk twice the length of the Williamson, West Virginia, flood wall (2x2.5 miles), but now he becomes short of breath if he walks a block; that he used to help his wife with the housework, but now it "gets to him" if he runs the sweeper; that he believes he is at increased risk of developing cancer because of his exposure to asbestos, and it worries or concerns him. Trial Transcript (4/17/98) at 51-54.

James Spangler testified that he first noticed his shortness of breath in or about 1992; that it has been getting worse; and that he is worried about being on oxygen all the time or being a burden to his children. Trial Transcript (4/20/98) at 61, 66. He also testified that it takes him five or six minutes to get the mail from his mailbox, which is only 110 feet from his house. *Id.* at 64, 65. At that rate, it would take him 20 minutes to walk a quarter mile. *Id.* at 65. When he finally brings the mail in the house, he has to stop and rest, and he is breathing heavily. *Id.* at 66. Mr. Spangler also discussed

how he supervises maintenance work at his rental properties. His helper drives him as close to the door as possible and brings a chair for him to sit in as he directs the work. *Id.* at 61. Even so, he is sometimes winded just walking in the house and sitting down. *Id.* at 62. Mr. Spangler also walked for the jury so they could see how slowly he moved. *Id.* at 63.

E. Judgment

On January 6, 1999, after deducting offsets for settlements with various manufacturers of asbestos products and premise defendants and reducing some verdicts for smoking related comparative negligence, the court entered judgment orders in favor of all plaintiffs. Several months later, on September 17, 1999, the trial court further reduced the judgments in all of these cases to give the defendant railroad credit for some additional settlements.

On or about January 19, 1999, the defendant, Norfolk Southern Railway Company, successor in interest to the Norfolk & Western Railway Company, filed a motion for judgment as a matter of law or in the alternative, for new trial or remittitur. The lower court entered an order denying this motion on September 13, 2000. The lower court entered a second, identical order denying the railroad's motion on November 13, 2000. By order entered on February 27, 2001, the lower court vacated its first two orders and once again denied the defendant's motion for new trial or remittitur.

REASONS FOR DENYING THE WRIT

I. These Cases Provide A Poor Vehicle For Deciding The Issues Raised By Petitioner.

One of the issues raised by the railroad concerns the ability of the jury to award damages for fear of cancer. Because of the verdict forms used in these cases, there is no way to determine whether the jury actually made such an award. On each verdict form, the jury indicated that the negligence of the Norfolk and Western Railway Company had caused or contributed to a "lung injury or pulmonary impairment", a finding amply supported by the evidence. The verdict forms used in these cases do not indicate the amount of damages, if any, awarded for fear of cancer or other emotional distress. The only question pertaining to damages on these forms asked the jury: "What amount do you find will reasonably compensate the plaintiff [NAME], for the ~~loss he~~ has suffered and may suffer in the future because of his lung injury?" Under W. Va. R. Civ. P. 49, the jury could have been asked to award specific sums for each element of damages. The railroad, however, did not request a more detailed verdict form, or object to the treatment of damages on the form used. Given these general verdicts, it is impossible to tell what amount of damages, if any, was awarded for emotional distress in general, or fear of cancer in particular. Under state law, the defendant's failure to request a breakdown of damages is sufficient to preclude appellate review of its argument that certain damages should not have been awarded. *See Gerver v. Benavides*, 530 S.E.2d 701 (W. Va. 1999) (per curiam); Syllabus Point 7, *Miller v. Monongahela Power Co.*, 403 S.E.2d 400 (W. Va. 1991); *Grove v. Myers*, 382 S.E.2d 536, 542 (W. Va. 1989).

The railroad also complains that the damages were not apportioned among employers. The occupational pneumoconioses suffered by the plaintiffs, however, are classic examples of "indivisible" injuries which cannot be rationally apportioned on the basis of causation. Moreover, even if the lower court had abandoned the doctrine of joint and several liability, there would have been no evidence to apportion damages on the basis of fault. If petitioner's counsel believed that some ruling by the trial court prevented them from presenting such evidence, they needed to vouch the record to preserve the issue for appellate review. *Finley v. Norfolk and Western Railway Co.*, 540 S.E.2d 144 (W. Va. 1999) (per curiam); *Torrence v. Kusminsky*, 408 S.E.2d 684 (W. Va. 1991).

Only two of the five plaintiffs had asbestos exposure at non-railroad jobs, and even in those cases, the railroad exposure was not minimal as alleged by the railroad. One of the plaintiffs with non-railroad asbestos exposure, Carl Butler, settled with a non-railroad employer, APCO, and the trial court allowed an offset for that settlement as well as for Mr. Butler's workers' compensation award. To have employed *both* a settlement offset and apportionment would have improperly reduced the petitioner's liability. Once again, these cases present a poor vehicle for deciding the issue presented.

II. The Alleged Conflict Of Authority Concerning Damages For Emotional Distress Is Based On Factually Distinguishable Cases, Most Of Which Predate This Court's *Gottshall* and *Metro-North* Decisions

The railroad asserts that there is a split of authority in the lower courts as to whether or not damages for emotional distress can be awarded in FELA cases absent some form of manifestation, presumably either physical symptoms or a medical diagnosis. On the "manifestation" side, it cites five FELA cases, two Jones Act cases and a state law tort action. On the other side it cites the Second Circuit's decision reversed by this Court in *Metro-North*.

In one of the "manifestation" cases referred to by the railroad, *Haggerty v. L&W Marine Serv., Inc.*, 788 F.2d 315, 317-18 (5th Cir.), *reh'g en banc denied*, 797 F.2d 256 (5th Cir. 1986), the Court actually rejected "physical manifestation" of emotional distress as a prerequisite to recovery. In another case cited by the railroad, *Bullard v. Central Vermont Railway, Inc.*, 565 F.2d 193 (1st Cir. 1977), the plaintiff hurt his foot in a train collision, but the emotional distress he sought to recover for did not involve any fear of future illness or injury resulting from the accident. In *Vance v. Consolidated Rail Corp.*, 652 N.E.2d 776 (Ohio 1995), where the plaintiff had been diagnosed with "severe depression", the railroad did not dispute that he had suffered emotional injury, and the court did not discuss what evidence was needed to establish emotional distress or opine that a psychiatric opinion was required.

None of the other FELA or Jones Act "manifestation" cases cited by the railroad involve a plaintiff who had suffered

a significant physical injury such as asbestosis. *See Martinez v. Bailey's Louisiana, Inc.*, 244 F.3d 477 (5th Cir. 2001) (sexual harassment case where plaintiff's counsel waived any claim of physical injury); *Moody v. Maine Central Railroad Co.*, 823 F.2d 693 (1st Cir. 1987) (railway employee failed to establish that employer's harassment caused his angina attacks and general fatigue); *Alabama Great Southern Railroad Co. v. Jackson*, 587 So. 2d 959 (Ala. 1991) (supervisors hiding in locomotive bathroom at 2 a.m. frightened train crewman); *McMillan v. National Railroad Passenger Corp.*, 648 A.2d 428 (D.C. 1994) (decided under D.C. rather than federal law) (uninjured plaintiff failed to show more than a minimal or negligible threat of harm, so he was never in the zone of danger) (court states in dicta that emotional distress must be "serious and verifiable" but does not explain what proof is required). Consequently, these cases tell us nothing about whether the issuing courts would require some "manifestation" of emotional distress in FELA cases where, as here, the plaintiffs *have* been physically injured.

Moreover, the cases cited by the petitioner tell us virtually nothing about how the lower courts are interpreting this Court's holdings in *Gottshall* and *Metro-North* because most of them predate one or both of those decisions. Three of the FELA cases and one of the Jones Act cases cited by the railroad in favor of a manifestation requirement predate *both Gottshall* and *Metro-North*, while the other two FELA cases predate only *Metro-North*. The only FELA or Jones Act case cited by the railroad which was decided *after* both *Gottshall* and *Metro-North* is *Martinez v. Bailey's Louisiana, Inc.*, 244 F.3d 474 (5th Cir. 2001) in which the plaintiff "did not [even] plead negligent infliction of emotional distress" as a cause of action. *Id.* at 477 n.2. Moreover, Martinez's counsel waived any claim of physical injury, either as an event

precipitating emotional distress or as a result of emotional distress. Consequently, the court acknowledged it did not have an opportunity to address the zone of danger rule adopted in *Gottshall*. *Id.*

III. The Alleged Conflict Of Authority Concerning Joint And Several Liability Is Not Based On Cases, Such As This One, Involving Multiple Tortfeasors And Indivisible Injuries

The railroad asserts that there is a split of authority concerning whether damages in FELA cases should be apportioned, with seven cases from six courts approving apportionment and four cases rejecting it. This alleged conflict is more apparent than real. None of the purportedly "pro-apportionment" cases cited by the railroad involve the joint and several liability of multiple tortfeasors whose negligence was held to result in a single, "indivisible" injury. Instead, they involve pre-existing conditions and/or separate and discrete injuries, apparently none of which were found to result in "indivisible" injuries. *See Sauer v. Burlington Northern Railroad Co.*, 106 F.3d 1490 (10th Cir. 1997) (two separate railroad injuries to back and pre-existing conditions of degenerative changes of lumbar vertebrae and abnormal curvature of spine); *Varhol v. National Railroad Passenger Corp.*, 909 F.2d 1557 (7th Cir. 1990) (per curiam) (alleged aggravation of pre-existing MS by train derailment); *Akers v. Norfolk and Western Railway Co.*, 417 F.2d 632 (4th Cir. 1969) (upholding against railroad challenge a jury instruction stating that the railroad was not responsible for pre-existing conditions it neither caused nor aggravated); *Shupe v. New York Central System*, 339 F.2d 998 (7th Cir. 1965) (shoulder injury and back injury resulting from separate injuries on railroad); *Gustafson v. Burlington Northern Railroad Co.*,

561 N.W.2d 212 (Neb. 1997) (given general verdict for plaintiff, trial court did not commit reversible error in giving instruction on aggravation of pre-existing injury that failed to say that if the jury could not determine how much of the plaintiff's current condition was due to aggravation, it should award damages for the entire condition); *Dale v. B&O*, 552 A.2d 1037 (Pa. 1989) (disability resulting from lifelong asthma and occupational asbestosis) (court did not determine "whether the evidence permits apportioning damages, or whether apportionment would be mere speculation, and whether plaintiff or defendant has the burden of proving the proportion of damages allegedly caused by B&O . . ."),[1] *Brewer v. Denver & Rio Grande Western Railroad*, 31 P.3d 557 (Utah 2001) (plaintiff with carpal tunnel claim also had "diabetes, obesity, age and sedentary habits"). None of the "pro-apportionment" cases cited by the railroad even discuss the joint and several liability of multiple tortfeasors for indivisible injuries, let alone say they are abandoning this rule. The failure of the petitioner to cite a single case rejecting joint and several liability in multiple tortfeasor situations is striking.

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1. The current status of the *Dale v. B&O* holding is unclear because of a recent decision by an intermediate appellate court in Pennsylvania holding that Conrail was responsible for the entire amount of damages for the plaintiff's carpal tunnel syndrome, although the railroad presented evidence that other activities, such as push-ups, could have been a contributing factor. *McDermott v. Consolidated Rail Corp.*, 768 A.2d 348, 352-53 (Pa. Super. Ct. 2001).

IV. Petitioner Exaggerates The Impact of the Lower Court's Ruling and the Importance of West Virginia As A Forum.

West Virginia Trial Court Rule 26.01 provides for a Mass Litigation Panel (MLP) similar to a federal MDL. In its petition, the railroad complains that all of the asbestos related FELA cases in West Virginia have been transferred to the Circuit Court of Kanawha County, West Virginia, for processing by the state MLP and that the trial judge in the cases at bar may be involved in trying FELA cases for the MLP. Consequently, it fears that the trial judge's rulings on apportionment and fear of cancer damages may be applied in other FELA cases in West Virginia. The railroad fails to mention, however, that it has filed a pending declaratory judgment action in federal court challenging the assignment of FELA cases to the MLP. *Norfolk Southern Railway Co. v. McGraw*, Civil Action No. 2:01 1238 (S.D. W. Va.). Moreover, even if the FELA cases remain subject to the jurisdiction of the MLP, Judge MacQueen will be subject to the supervision of both Judge Gaughan, the supervising judge for the MLP, and the State Supreme Court. *See State ex rel. Allman v. MacQueen*, 551 S.E.2d 369 (W. Va. 2001) (per curiam). In addition, the Chief Justice of the Supreme Court of Appeals of West Virginia is free to assign additional judges to try MLP cases, *id.* at 377, 378; Trial Court Rule 26.01(3), so there is no guarantee that Judge MacQueen will try any or all of the FELA cases.

In an effort to magnify the importance of the lower court's ruling, the railroad notes that there are no appeals of right in West Virginia.[2] The Supreme Court of Appeals, however, has

2. Although there is no appeal of right in civil cases, the Supreme Court of Appeals of West Virginia accepts a high percentage (Cont'd)

frequently resolved appeals and writs arising from FELA litigation and in many cases has ruled in favor of the railroad.[3] That Court has also reviewed asbestos litigation on many occasions,[4] including a FELA case involving mesothelioma, a cancer of the pleural lining caused by exposure to asbestos. *See Lamphere v. Consolidated Rail Corp.*, 557 S.E.2d 357 (W. Va. 2001).

(Cont'd)

of petitions for appeal. Under its original jurisdiction, the Court also rules on many issues raised by extraordinary writs such as mandamus and prohibition. In 2000, the most recent year for which statistics are available, the Court granted 51.6% of the 3,403 petitions for appeal and extraordinary writ it considered. 2000 Statistical Report, Supreme Court of Appeals of West Virginia. More specifically, it granted 28.5% of the 431 petitions for appeal it considered in civil cases. *Id.* To put these figures in perspective, "[o]n average, all state courts of last resort granted only 10 percent of discretionary petitions considered in 1999." *Id.*

3. *See, e.g., Finley v. Norfolk and Western Railway Co.*, 540 S.E.2d 144 (W. Va. 1999) (per curiam) (upholding on appeal a lower court ruling that denied the plaintiff's motion for new trial); *Gardner v. CSX Transp., Inc.*, 498 S.E.2d 473 (W. Va. 1997) (upholding on appeal a summary judgment and directed verdict in favor of the railroad); *Norfolk and Western Railway Co. v. Tsapis*, 400 S.E.2d 239 (W. Va. 1990) (writ of prohibition) (holding that doctrine of forum *non conveniens* applies in FELA cases).

4. *See, e.g., Marlin v. Bill Rich Const., Inc.*, 482 So. 2d 620 (W. Va. 1996); *State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300 (W. Va. 1996); *In Re State Public Bldg. Asbestos Litigation*, 454 S.E.2d 413 (W. Va. 1994); *Abbott v. Owens-Corning Fiberglas Corp.*, 444 S.E.2d 285 (W. Va. 1994); *State ex rel. CCR Ltd. v. MacQueen*, 441 S.E.2d 658 (W. Va. 1994); *Davis v. Celotex Corp.*, 420 S.E.2d 557 (W. Va. 1992); *State ex rel. H.K. Porter Co. v. White*, 386 S.E.2d 25 (W. Va. 1989).

The fact that the Supreme Court of Appeals of West Virginia has declined to accept two of the petitioner's cases for appeal hardly constitutes "a pattern of injustice and maladministration of an important statute in West Virginia," petition at 3, especially when both appeals suffered from the same procedural shortcomings, *i.e.*, a failure to ask for a special interrogatory pertaining to damages in the trial court and a failure to allege or present any evidence of negligence on the part of other employers in cases where apportionment was sought.

As noted below, the lower court's rulings on fear of cancer claims and joint and several liability are consistent with the position taken on those issues by numerous courts in other jurisdictions. Moreover, in choosing a venue in which to file suit, plaintiffs' counsel have many factors to consider in addition to how the forum court has ruled, or may rule, on those two particular issues. For example, counsel must consider how congested the court system is, what kind of jury may be empaneled, how convenient the forum will be to an often elderly or infirm client who finds it difficult to travel, how accessible witnesses will be, the procedural and evidentiary rules of the forum, and the possibility that the chosen forum may dismiss a non-resident's claim on forum *non conveniens* grounds. Indeed, West Virginia's courts have frequently dismissed FELA cases pursuant to such motions, as evidenced by respondents' lodging in *Norfolk & Western Railway Co. v. Dye*, 121 S. Ct. 2593 (2001) (mem.), which included 15 dismissal orders. In addition, many law firms based in West Virginia, including respondent's counsel, have frequently filed FELA cases in other states such as Virginia, Kentucky and Ohio, and many firms based in surrounding states have never filed a single FELA case in West Virginia.

The claims involved in this appeal certainly do not illustrate the problem alleged by petitioner because they do not involve non-resident plaintiffs seeking a more friendly forum than their home states. These six consolidated cases were tried in Charleston, West Virginia, and all of the plaintiffs had strong connections with the forum state. Freeman Ayers had lived in Princeton, West Virginia since 1940, Trial Transcript (4/17/98) at 5, and worked for the railroad in Princeton, West Virginia and Elmore, West Virginia. *Id.* at 7, 16. Carl Butler was born in Bluefield, West Virginia, Trial Transcript (4/16/98) at 5, and was living in Pipestem, West Virginia at the time of trial. *Id.* at 3. He worked for the railroad in Princeton, West Virginia. *Id.* at 8, 12. Doyle Johnson had spent most of his life in West Virginia. Trial Transcript (4/17/98) at 3-4. At the time of trial, he was living in Williamson, West Virginia. *Id.* at 3. For much of his railroad career, he was based in Williamson, West Virginia. John Shirley was a long time resident of West Virginia who worked for the railroad for 29 years in Bluefield, West Virginia. *Id.* at 6-7, 29. James Spangler was born in Wilcoe, West Virginia, and at the time of trial, had lived in Princeton, West Virginia, for 60 years. Trial Transcript (4/20/98) at 4. Much of his railroad career was spent in the Princeton/Bluefield, West Virginia area. *Id.* at 10, 26, 28, 29. Clifford Vance was born and went to school in Iaeger, West Virginia. Trial Transcript (4/15/98) at 5. At the time of trial, he was living in the area between Bluefield and Princeton, West Virginia. *Id.* He worked for the railroad in Iaeger, West Virginia and Bluefield, West Virginia. *Id.* at 9, 19, 23, 26.

In its petition, the railroad notes that there were approximately 2,500 asbestos-related railroad cases filed in West Virginia according to an administrative order filed by the Supreme Court of Appeals on December 28, 2000.

The petition does not indicate, however, how many of those 2,500 plaintiffs were West Virginia residents, nor how many of the non-resident plaintiffs had worked for the railroad in West Virginia. Nor does it give the reader any basis for comparing this figure to the asbestos-related caseload in other states. Because railroads have historically been a major employer in many West Virginia counties, it should come as no surprise that this state has a significant FELA caseload. In fact, the C&O, a predecessor to CSX, maintained what was widely acclaimed as the largest steam locomotive repair facility in the world at Huntington, West Virginia, a city named after a railroad magnate. The Norfolk and Western Railway Company and the Virginian Railway, predecessors in interest to today's Norfolk Southern Railway Company, also maintained track and facilities in a host of West Virginia communities, including Bluefield, Princeton, Iaeger, Logan and Williamson. Other railroads which have operated in West Virginia include the B&O, New York Central, Penn Central, Conrail and the Wheeling & Lake Erie Railway.

The railroad cites various mass filings of FELA claims in the Northern Panhandle of West Virginia by a law firm with offices in West Virginia and Pennsylvania. Although the railroad notes that many of these plaintiffs were non-residents, it does not indicate how many of the non-residents worked for the railroad in West Virginia at some point in time, or whether any forum *non conveniens* motions were filed. Without this information, the significance, if any, of the mass filings is at best unclear. Moreover, despite the railroad's complaints about the *in terrorem* effect of mass filings, there is nothing in the record to suggest that FELA settlements are any higher in West Virginia than in other states. In fact, the railroad asserts at page 3 that the "vast majority" of claims settle "for far less than the cost to the railroads of taking the cases to trial." Apparently, the *in terrorem* effect, if any, of mass filings is not very pronounced.

V. The Rulings Of The Lower Court Were Correct

A. Emotional Distress

Because all respondents suffered significant injuries from their occupational exposure to asbestos and, in some cases, silica, two widely recognized human lung carcinogens, the trial court properly instructed the jury that it could award damages for emotional distress, including fear of cancer. Its ruling was consistent with this Court's *Metro-North* decision, which held that a person exposed to a toxic substance such as asbestos cannot recover damages for fear of cancer unless and until he "manifests symptoms of a disease." 521 U.S. at 427. In this case, all respondents have been diagnosed with occupational pneumoconioses, thus meeting that requirement. This Court has never required a plaintiff who currently suffers from a compensable injury or illness to also establish a physical manifestation of his emotional distress, nor should it, although invited to do so in both *Gottshall* and *Metro-North*. In fact, in *Metro-North*, this Court recognized that "[c]ommon law courts do permit a plaintiff who suffers from a disease to recover for related negligently caused emotional distress . . .", 521 U.S. at 432, and that "[t]he law, . . . does permit recovery for emotional distress where that distress accompanies a physical injury, . . ." *Id.* at 429-30. It also distinguished *Lavelle v. Owens-Corning Fiberglas Corp.*, 30 Ohio Misc.2d 11, 507 N.E.2d 476, 480-81 (C.P. 1987), which allowed the recovery of damages for fear of cancer, as a case involving an "asbestos-afflicted plaintiff" who "fell within a category where the law already permitted recovery for emotional distress." 521 U.S. at 437.

In its decisions concerning emotional distress damages in FELA cases, this Court has looked for guidance to the common law. Historically, plaintiffs who suffered a physical injury or illness have been allowed to recover damages for emotional distress related to their injuries or the conduct which caused them. *See* Restatement (Second) of Torts § 456 (1965) ("Emotional Disturbance Resulting From An Actionable Injury Or The Conduct Which Caused It").

Many state and local courts have allowed fear of cancer claims in cases involving asbestosis or asbestos related pleural disease without requiring any physical manifestation of emotional distress. *See, e.g., Dunn v. HOVIC*, 1 F.3d 1362, 1367 (3d Cir. 1993); *Herber v. Johns-Manville Corp.*, 785 F.2d 79, 83-85 (3d Cir. 1986); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 413-14 (5th Cir. 1986) (en banc); *Griffin v. Keene Corp.*, No. 85 C 10748, 1990 WL 93292 (N.D. Ill. June 19, 1990); *Mauro v. Owens Corning Fiberglas Corp.*, 542 A.3d 16 (N.J. Super. 1988); *Lavelle v. Owens-Corning Fiberglas Corp.*, 30 Ohio Misc. 2d 11, 507 N.E.2d 476 (C.P. 1987); *Eagle-Picher Industries, Inc. v. Cox*, 481 So. 2d 517, 526-29 (Fla. Dist. Ct. App. 1985); *Denton v. Southern Railway Co.*, 845 S.W.2d 885, 888-89 (Tenn. Ct. App. 1993) (FELA).

Allowing railway employees who suffer from asbestosis or other occupational diseases to recover damages for a reasonable fear of developing cancer does not "open the floodgates," a concern expressed in this Court's earlier emotional distress cases. Accordingly, such claims are permitted under FELA in keeping with its remedial and humanitarian purposes.

B. Joint And Several Liability

Given the indivisible nature of the lung diseases of Respondents Ayers and Butler (the only cases arguably involving non-railroad exposure), the lower court did not err in applying joint and several liability, even though there may have been asbestos exposure at other job sites. *See Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1094-96 (5th Cir. 1973) (asbestosis is an indivisible injury); Restatement (Second) of Torts § 433A, comment i (1965) (damages for most personal injuries cannot be apportioned), Trial transcript (4/16/98) at 147 (testimony by Dr. Gaziano that one has to consider the cumulative effect with dust diseases because all exposures contribute to the disease); Transcript (4/24/98) at 165-67 (testimony by Dr. Renn that fiber burden over entire career contributes to disease).

FELA provides that a carrier is responsible for any injury caused, in whole or in part, by its negligence. 45 U.S.C. § 51. FELA provides no grounds for diminishing that responsibility other than the contributory negligence, if any, of the employee. *See* 45 U.S.C. § 53. This statutory language is reinforced by the common law.

At common law, multiple tortfeasors whose negligence combined to cause a single, indivisible injury were jointly and severally liable for the plaintiff's loss. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260 & n.8 (1979); Restatement (Second) of Torts §§ 875, 879 (1977); Restatement of Torts §§ 875, 879 (1939); Dan B. Dobbs, *The Law Of Torts* § 390 at 1091 (2000). It was the function of the judge, rather than the jury, to determine whether an injury was divisible or indivisible. Restatement (Second) of Torts § 434 (1965). If a party believed that

apportionment of damages was appropriate, it had the burden of proving what portion of the damages it should be responsible for. Restatement (Second) of Torts § 433B(2) (1965).

When Congress enacted FELA, it did not abolish the common law doctrine of joint and several liability. Over the many years since FELA was passed, state and federal courts have frequently recognized that multiple tortfeasors who cause an indivisible injury are jointly and severally liable to the plaintiff.[5] Congress, which must have been aware of these decisions, has never seen fit to amend FELA to provide for some form of proportionate liability of joint tortfeasors. Given the delicate balance of statutory compensation schemes such as FELA, and the variety of apportionment mechanisms that might be substituted for traditional joint and several liability, any change to the apportionment rules under FELA should come from Congress, rather than the courts.[6]

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5. *See, e.g., Lockhard v. Missouri Pacific RR*, 894 F.2d 299, 305 (8th Cir. 1990); *Lewis v. Cimarron Valley Railroad*, 162 F. Supp. 2d 1220, 1227 (D. Kan. 2001); *Stephens v. Southern Pacific Transportation Co.*, 991 F. Supp. 618, 620 (S.D. Tex. 1998); *Rice v. Cincinnati, New Orleans & Pacific Railway Co.*, 920 F. Supp. 732, 735 (E.D. Ky. 1996); *Mazyck v. Long Island Railroad Co.*, 896 F. Supp. 1330, 1332-333 (E.D.N.Y. 1995); Syllabus Point 1, *Gaulden v. Burlington Northern, Inc.*, 654 P.2d 383 (Kan. 1982); *Narcise v. Illinois Central Gulf Railroad Co.*, 427 So. 2d 1192, 1195 (La. 1983); *Lewis v. National Railroad Passenger Corp.*, 176 Misc. 2d 947, 675 N.Y.S.2d 504 (1998); *Denton v. Southern Railway Co.*, 854 S.W.2d 885, 888 (Tenn. Ct. App. 1993). *See generally* 46 CJS "Employers" Liability § 47 (1992).

6. In those states which have modified or abolished joint and several liability, the change has usually come through legislative (Cont'd)

Contrary to the railroad's assertions, joint and several liability is not an anachronism, but a widely applied doctrine of continuing vitality, not just here but abroad. It is applied not only in FELA cases but in Jones Act cases,[7] general maritime personal injury cases, *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113 (5th Cir. 1995), Longshoremen's and Harbor Workers' Compensation (LHWC) cases, *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), Death on the High Seas Act (DOHSA) cases, *In Re Ocean Foods Boat Co.*, 692 F. Supp. 1253, 1264 (D. Ore. 1988), Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) cases,[8] and Federal Water Pollution

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enactment, rather than judicial decision. *See* Restatement (Third) of Torts: Apportionment of Torts § 17 at 153, 154, 156, 157, 159 (2000); Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 Mem. St. U. L. Rev. 45, 82-3 (1992).

7. *Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421, 1430-32 (5th Cir. 1988); *Joia v. Jo-Ja Serv. Corp.*, 817 F.2d 908, 917 (1st Cir. 1987); *Dicola v. American Steamship Owners Mut. Protection & Indemn. Assn. (In Re Prudential Lines, Inc.)*, 170 B.R. 222, 235 (S.D.N.Y. 1995); *Johnson v. National Steel & Shipbuilding Co.*, 742 F. Supp. 1062, 1065 (S.D. Cal. 1990); *Texaco v. Addison*, 613 So. 2d 1193, 1202 (Miss. 1993).

8. *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir. 1998); *Ohm Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1579 (5th Cir. 1997); *Rumpke of Indiana v. Cummins Engine Co.*, 107 F.3d 1235, 1240 (7th Cir. 1997); *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 514 (2d Cir. 1996); *Price v. U.S. Navy*, 39 F.3d 1011 (9th Cir. 1994); *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1280 (3d Cir. 1993); *O'Neill v. Picillo*, 883 F.2d 176, 178-79 (1st Cir. 1989); *United States v. Monsanto Co.*, 858 F.2d 160, 171-73 (4th Cir. 1988).

Control Act (FWPCA) cases. *United States v. M/V Big Sam*, 681 F.2d 432, 439 (5th Cir. 1982), *In Re Berkley Curtis Bay Co.*, 557 F. Supp. 335, 338-40 (S.D.N.Y. 1983). In addition, "joint and several liability with contribution has long been the rule in England and almost all other countries, most of which have comparative responsibility liability regimes." Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U. Cal. Davis L. Rev. 1141, 1185 (1988).

As recently as twenty-five years ago, joint and several liability was the rule in every state in the country. *Coats v. Penrod Drilling Corp.*, 61 F.3d at 1130-31. In the name of "tort reform," a number of states have since abandoned or modified traditional joint and several liability, but fifteen states (one more than the number of states using the zone of danger test when *Gottshall* was decided) still retain pure joint and several liability, while twenty other states retain it in a modified or limited form. Restatement (Third) of Torts: Apportionment of Liability § 17, reporter's note at 149 (2000). For example, some states apply joint and several liability when the plaintiff is free of negligence (under which approach respondents Vance, Shirley and Butler would be able to recover all of their damages from the railroad)[9] or apply joint and several liability only in certain kinds of cases.[10]

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9. GA. Code Ann. § 51-12-33; Mo. Ann. Stat. § 537.067; Okla. Stat. Tit. 23, § 13; Wash. Rev. Code Ann. § 4.22.070.

10. Significantly, some states have enacted legislation expressly retaining joint and several liability in cases involving toxic substances such as asbestos. *See* Haw. Rev. Stat. § 663-10.9(2)(c); *In Re Hawaii*

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Regardless of what rules the state legislatures may choose to apply in tort cases, however, this court must be guided by the intent of Congress when it enacted FELA to shift the cost of industrial injuries and deaths to employers. *See Kernan v. American Dredging Co.*, 355 U.S. 426, 431-32 (1958). Abandoning the rule of joint and several liability in cases where the negligence of multiple tortfeasors results in an indivisible injury would be inconsistent with that goal. Under joint and several liability, the defendant bears the burden of locating and suing other potentially responsible tortfeasors and the risk that some or all of them may be dissolved, insolvent, immune from suit or simply not worth pursuing. Under the rule of several liability advocated by the petitioner, the injured party, even if wholly free of any contributory negligence, would bear those risks and burdens.

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Federal Asbestos Cases, 960 F.2d 806, 818-19 (9th Cir. 1992); Ill. Comp. Stat. § 5/2-1118; *Padgett v. A&M Insulation Co.*, 640 N.E.2d 21, 23-4 (Ill. Ct. App. 1994); N.J. Stat. Ann. §§ 2A:115-5.3(d)(1) & (f); *Stevenson v. Keene Corp.*, 603 A.2d 521 (N.J. Super. Ct. 1992), *aff'd, per curiam*, 620 A.2d 1047 (N.J. 1993); Tex. Civ. Prac. & Rem. Code Ann. § 33.013(c)(2); *McNair v. Owens-Corning Fiberglas Corp.*, 890 F.2d 753 (5th Cir. 1989); Wash. Rev. Code § 4.22.070(3)(a); *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 728 (Wash. 1989).

CONCLUSION

The Norfolk Southern's petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — RELEVANT DOCUMENTS

[Omitted here but submitted separately as Lodging]